



POLICY BRIEF



CONGRESSIONAL REVIEW ACT

Congress has allocated considerable power to the Executive Branch by delegating rulemaking authority to federal agencies.¹ Today, federal regulations govern nearly every aspect of daily life.² With the stroke of a pen, President Biden expanded the administrative state's power to an historic level, by signing more Executive Orders (EO) in his first two weeks of office than President Franklin D. Roosevelt in his first month.³ These EO's carry the force of law over matters of climate change, immigration, education, and other areas.⁴ Congress has the authority to overturn federal agency rules through a disapproval resolution under the Congressional Review Act .

- Currently, the Congressional Review Act (CRA) is the most significant tool Congress has to counter agency rules which run afoul of congressional intent.⁵
 - For a regulation to be invalidated by the CRA, the U.S. Senate and House of Representatives must pass a joint resolution of disapproval either signed by the president, or override the president's veto, within 60 legislative days of the rule being transmitted to Congress.⁶
 - A total of 17 resolutions of disapproval have been enacted under the CRA, 16 of which passed in the 115th Congress.^{7,8}
- The CRA requires federal agencies to submit a copy of a rule to Congress and the Government Accountability Office (GAO) before the rule can take effect.^{9,10} The CRA's expedited procedures only become available once Congress receives the rule from the agency.
 - According to the Congressional Research Service (CRS), it is unlikely a court would compel an agency to submit a rule to Congress under the CRA, due to the law's provision on prohibiting judicial review.¹¹
 - Congress may seek an opinion from GAO on whether an action meets the definition of a rule, and therefore should have been submitted. If GAO determines an action should have been submitted, Congress can proceed with consideration of a joint resolution of disapproval.¹²
- **Senate Republicans can force a vote and send a message to the American people.**¹³
 - Fast Track to Senate Floor: A discharge petition signed by 30 senators can fast track consideration of the joint resolution from committee to the floor. This is effective after expiration of a 20-calendar day period after a final rule is received by Congress. Once a joint resolution reaches the Senate floor, any senator can require a vote on a motion to proceed to consideration.¹⁴
 - For example, Senate Democrats passed a successful CRA vote on a Department of Education rule during the 116th Congress, despite being in the minority party. However, President Trump vetoed the resolution.¹⁵
 - Rules for consideration in the House: "The CRA also provides expedited procedures that govern the consideration by either the House or Senate of a disapproval resolution received from the other chamber." When the Senate initiates the process, the joint resolution would be held at the desk in the House. The House may choose whether to take up the measure for consideration.¹⁶

- According to CRS, “if either chamber rejects a CRA disapproval resolution on a major rule, it could have the effect of putting a regulation in force sooner than would otherwise be the case.”¹⁷
- House Republicans may also consider introducing a joint resolution of disapproval to expose overreach and the harmful actions of the Biden Administration.¹⁸

¹ Congressional Research Service, IF10003, *An Overview of Federal Regulations and the Rulemaking Process* (2019) <https://fas.org/sgp/crs/misc/IF10003.pdf>.

² Calculating the comprehensive cost of federal regulations on the economy is difficult. Estimations provided by the Mercatus Center, the Competitive Enterprise Institute, and the American Action Forum range from hundreds of billions to trillions of dollars. Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, CEI.org (2019), <https://cei.org/sites/default/files/10KC2019.pdf>

³ FDR held the previous record for Executive Orders. <https://www.npr.org/2021/02/03/963380189/with-28-executive-orders-signed-president-biden-is-off-to-a-record-start>

⁴ <https://fee.org/articles/twenty-eight-executive-orders-in-only-two-weeks/> and <https://www.cnn.com/interactive/2021/politics/biden-executive-orders/index.html>

⁵ 5 U.S.C. § 801-808 (2012).

⁶ The joint resolution of disapproval must be passed with identical text. Veto overrides require a 2/3 majority of Congress.

⁷ Notably, the 16 resolutions of disapproval from 2017-8 took place under the Trump Administration, when Republicans held the majority for both chambers of Congress. Prior to the 115th Congress, the only successful CRA enactment to overturn a rule was in 2001. Congress has introduced over 200 joint resolutions of disapproval under the CRA pertaining to more than 125 rules.

<https://fas.org/sgp/crs/misc/R43992.pdf>

⁸ https://harvardlawreview.org/wp-content/uploads/pdfs/vol_122_the_mysteries.pdf. Further, the CRA is generally only effective to invalidate regulations when one political party takes control of both the White House and Congress and seeks to reverse rules promulgated towards the end of the prior administration. See House Republican Policy Committee policy guide, 116th Congress, entitled “Create Congressional Accountability for Major Rules.”

⁹ The CRA does not specify when an agency must submit a rule. Congressional Review Act, 5 U.S.C. § 801(a)(1)(A).

<https://www.gao.gov/legal/other-legal-work/congressional-reviewact#database>

¹⁰ According to a 2018 GAO report, 25% of “economically significant” regulations did not comply with the CRA, due primarily to agencies’ failure to observe the 60-day effective date delay for congressional review. GAO-18-183, *Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance During and at the End of Presidents’ Terms* (2018), <https://www.gao.gov/assets/700/690624.pdf>.

¹¹ <https://www.crs.gov/Reports/IF11096?source=search&guid=713580bceac64cfab8aa933e5476a7b2&index=0> According to CRS, “Because the CRA’s special procedures are not triggered until rules are submitted to Congress, if an agency does not submit a rule to Congress, this could potentially frustrate Congress’s ability to review rules... Furthermore, because the CRA contains a provision barring judicial review, most courts have declined to review claims challenging an agency’s failure to submit a rule, making it unlikely that courts would compel an agency to submit a rule under the CRA even if it met the definition of rule.”

<https://fas.org/sgp/crs/misc/R43992.pdf>

¹² <https://www.crs.gov/Reports/IF11096?source=search&guid=713580bceac64cfab8aa933e5476a7b2&index=0>

¹³ CRS specifically lists “drawing attention to a rule” as an advantage of the CRA. <https://fas.org/sgp/crs/misc/R43992.pdf>

¹⁴ Generally, if the motion to proceed is successful, the CRA disapproval resolution is subject to 10 hours of debate, with no amendments. “Should a majority of the Senate make a nondebatable motion to proceed to consider the disapproval resolution, debate is limited.” Under certain conditions, a joint resolution of disapproval cannot be filibustered. Notably, “unlike the regular legislative process, the CRA disapproval mechanism is available in the Senate only during certain statutorily specified time periods.”

<https://fas.org/sgp/crs/misc/R43992.pdf>

¹⁵ Notably, Democrats held the majority in the House. Further, 10 Republican senators joined the Democrats.

<https://www.congress.gov/bill/116th-congress/house-joint-resolution/76> and <https://www.yalejreg.com/nc/why-the-congressional-review-act-may-still-be-important-even-if-republicans-win-the-senate/>.

¹⁶ Further, the “House could take up the received Senate measure, should it choose to do so, under its normal parliamentary mechanisms without having a companion resolution submitted in the House.” <https://www.everycrsreport.com/reports/R43992.html>

¹⁷ See 5 U.S.C. § 801(a)(5), provided by CRS at <https://fas.org/sgp/crs/misc/R43992.pdf>

¹⁸ The CRA does not authorize fast track procedures for committee and initial floor consideration in the House. “In every case in which the House has considered a CRA disapproval resolution on the floor, it has done so under the terms of a closed special rule reported by the Rules Committee and adopted by the House... When considered under the terms of a special rule, the House minority leader or [a] designee is guaranteed the opportunity to offer a motion to recommit the joint resolution, with or without instructions.” When a measure is considered under the terms of a closed special rule, no floor amendments are in order. <https://fas.org/sgp/crs/misc/R43992.pdf>. Unfortunately, House Democrats passed expansive rules overhauling institutional minority procedural rights in the 117th Congress, particularly the motion to recommit. The House rules eliminate MTRs with instructions, and time for debate on the MTR.